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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
1980-91 TERM

WILLIAM R. COLE,

PETITIONER-PLAINTIFF

VS.

HENRY B. GRAY, III,
FRANCIS J. CUMMINGS,
FRED R. JONES, and
ALVIN HOLMES, EACH
INDIVIDUALLY AND EACH
IN HIS OFFICIAL CAPACITY,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE OF FRED R. JONES TO

PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

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QUESTIONS PRESENTED FOR REVIEW

1. The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's claim based on defamation.
2. The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's conspiracy claim.
3. The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's First Amendment claim.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding in the United States Court of Appeals for the Fifth Circuit were as follows:

William R. Cole, plaintiff-appellee-cross-appellant; Fred R. Jones, defendant-appellant-cross-appellee; Alvin Holmes, defendant-appellant-cross-appellee; Henry B. Gray, III, defendant-appellee, and Francis J. Cummings, defendant-appellee.

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STATEMENT OF THE CASE

Defendant Jones was a member of the Alabama Senate at all times relevant to this case (R. 127). In October 1975, the House of Representatives and the Senators of the Alabama Legislature passed a resolution creating an Interim Committee to investigate the use of federal monies received by State agencies (R. 135).

The Interim Committee consisted of three Senators, including Defendant Jones, and three members of the House of Representatives, including Defendant Alvin Holmes. The Joint Interim Committee first met on November 24, 1975, and Defendant Jones was elected Chairman of the Committee.

The Committee mailed letters to dozens of State agencies and departments seeking information on federal funding and/or federal grants (R. 583). While the Committee was making its study and investigating various departments, it became aware of certain irregularities in the Military Department. Defendant Jones offered to step aside as Committee Chairman because of his connection with the Military Department, but the Committee refused to accept his offer (R. 129). One

of the matters that came to the Committee's attention concerned large sums of extra duty pay for recruiting and retention activities paid to high ranking officers in the Alabama National Guard, including Colonel Cole. For example, the following officers received in 1975 in addition to their salaries as fulltime state or federal employees, and in addition to approximately 48 days of drill pay, payment for extra duty days as shown by their names:

General Rollo (then Ad. Gen.)	171 extra duty days
Colonel Speigner	136 extra duty days
Major Hathorn	179 extra duty days
Colonel Hora	129 extra duty days
Colonel Cole	166 extra duty days

Colonel Cole was involved in the payment of these extra duty days as a recipient of the funds and as the Personnel Officer of the Alabama Military Department. The Committe was critical of this practice.[2/]

1/ This information compiled by the Department of Examiners and Public Accounts (R 571). See also R. 587.

2/ The trial court's opinion at R.685 states that a guardsman could get 4 days of drill pay for being at drill 2 days and thus he could pick up 11 days of work each week by attending drill or 458 man days a year. In this the trial court is in error; a guardsman can receive no more than credit for 4 days of drill per month or 48 drill days per year, not the number suggested by the trial court (Cole depo., R. 506, 507).

Numerous other charges of irregularities in the Alabama National Guard included misuse of National Guard helicopters for the private benefit of friends of General Rollo, misuse of National Guard canteen funds and State cars by National Guard officers, conflicts of interest in National Guard purchases, nepotism, and excessive and improper expenditure of National Guard funds for dinners for high ranking National Guard officers (R 604).

As noted in the Court of Appeals' opinion, the hearings before the Interim Committee were open to the public and were widely reported by the news media throughout the State of Alabama.

On March 9, 1976, then Adjutant General Rollo requested that the Commanding General of the First Army conduct an investigation of recruiting and retention practices of the Alabama Army National Guard. Major Cummings and Major Holmes were assigned by First Army to conduct this investigation. Defendant Jones was instructed by the Interim Committee to extend an invitation to them to meet with the Committee.

The Committee had a short meeting with Major Cummings

and Major Holmes at the State Capitol in the Committee Room and advised them generally as to the information the Committee had obtained. As Defendant Jones has stated in his affidavit, to the best of his recollection, Colonel Cole was not mentioned or discussed during this meeting of the Interim Committee. The main thrust of the meeting was to advise the federal officers that the Interim Committee desired to cooperate with the federal investigation and desired them to conduct a thorough investigation. Neither visiting officer encouraged or discouraged the Committee's offer to provide them with information the Committee had received, but subsequently they never sought or obtained this information (R 572).

This meeting was the only meeting or personal encounter between Defendant Jones and either Major Cummings or Major Holmes. Later Defendant Jones called Major Cummings on the telephone approximately four or five times. Each call was made in his official capacity as Chairman of the Interim Committee, on behalf of the Committee, pursuant to its instruction and in the presence of the Committee at the State Capitol.

Colonel Cole was never mentioned or discussed in these telephone conversations, and the information given to Major Cummings in the telephone conversations did not concern matters in which Colonel Cole was involved or connected in any way (R. 572).

Colonel Cole in his deposition taken more than six months after he filed this lawsuit conceded that he had no knowledge of any communication between Defendant Jones and either Major Cummings or Major Holmes other than the meeting when the Committee was in session at the Committee room, and the few telephone calls by Defendant Jones to Major Cummings, which calls were made at the instance of the Committee when the Committee was in session (Cole depo., p. 531-533).

The Report of Inquiry (hereinafter referred to as ROI) prepared by Major Cummings and Major Holmes was many hundreds of pages in length, and dealt with many irregularities in the National Guard (See ROI and R. 587-589). It contained over a thousand pages of exhibits. Major Cummings and Major Holmes interviewed dozens of witnesses, including Plaintiff Cole. The report was not

completed for some five and a half months. Many of the irregularities referred to in the ROI were not even known to Defendant Jones or the Interim Committee prior to the publication of the Report (R. 573). Among many other irregularities, the ROI was sharply critical of the practice and procedure under which large sums of money were annually paid to high ranking National Guard officers who were also fulltime State officials for recruiting and retention duty. The ROI was filed by Major Cummings in September 1976, and it was reviewed and concurred in by the Inspector General of the First United States Army and endorsed by the Commanding General of the First United States Army.

The ROI was furnished to Governor Wallace in September 1976, and made public in March or April, 1977. When the ROI was made public,it was widely quoted in dozens of Alabama newspapers. See, for example, article appearing in the Anniston Star, April 2, 1977 (R. 587), and an article appearing in the Birmingham Post Herald on April 2, 1977 (R. 588, 589.)

An investigation of the practice under which high ranking officers of the Alabama National Guard received

large sums in recruiting and retention extra duty pay was also investigated by a second Army group totally independent from the investigation of the First Army. The second investigation was conducted by Lt. Colonel Donald Lundy and was approved by Lt. General Fuller. This report stated:

> 29. MG Rollo, COL Speigner, and MAJ Hathorn did not violate existing regulations in performing this extensive active duty. However, the conditions under which the FTTD for R&R was justified and the method in which it was performed is considered an abuse of the purpose and intent of the FTTD for R&R active duty program and gave the appearance of having been performed for personal gain by each officer. . .
>
> 31. This abuse of active duty days under the FTTD for R&R program occurred to a large extent due to the lack of controls and definitive criteria for FTTD for R&R in NGB Pamphlet 37-78. This pamphlet, as currently written, coupled with the lack of other controls and policies, permitted blatant, albeit legal, abuse of the FTTD for R&R program by MG Rollo, COL Speigener, and MAJ Hathorn and probably by other members of the Army National Guard (R 574).

The Alabama Senate Budget Committe of which Defendant Jones was never a member was also extremely critical of this same practice, stating in its report:

> The Alabama National Guard is made up largely of dedicated officers and enlisted personnel who continue to perform notable services in our state and nation.

> Unfortunately, a few of the high ranking officers who run the Military Department have allowed their personal interest to override the best interests of the National Guard personnel.

The Budget Control Committee of the Senate recommended that the practice of working these "extra duty days by the Adjutant General or other officers in 'active duty status' be" allowed only when "specifically authorized in writing by the Governor." It referred to this practice of excessive extra duty days for high ranking officers as "double or triple dipping." (R. 592). It also recommended that the National Guard Bureau's recommendation be followed that "a maximum of twenty-four active duty days be allowed to State National Guard officers." (R. 591-593). The Budget Committee Report was extremely critical of a number of other practices of officers in the Alabama National Guard (R. 594-598).

The Office of the Examiner of Public Accounts was also critical of the National Guard administration in Alabama, and its report was given wide publicity. See, for example, an editorial appearing in Anniston Star,

October 17, 1976 (R. 604). Editorials and newspaper articles around the State of Alabama were also extremely critical of the practice of high ranking officers receiving both state and federal pay for the same type of duty assignment on the same day, reflecting sixteen hours of work on many of the same days. The practice was also called "double dipping" in the ROI and in the newspapers (R. 605-612). (These Record pages contain a few examples of such critical news articles and editorials which were widely published throughout the State of Alabama.)

When Plaintiff Cole appeared before the Interim Committee, Defendant Jones asked him how he could work at top capacity more than 365 days each year. He responded that he was "worn out" from this practice (R 612). For example, Plaintiff Cole was paid for 486 days in a single year, and had received pay for substantially more than 365 days for 1973, 1974, and 1975. See Anniston Star, April 15, 1976 (R 612). Although Colonel Cole said this practice left him "worn out," he nevertheless contended on his deposition

that such extra duty pay was a good practice and that it should be continued. Defendant Jones strongly disagreed with him then and now.

In October 1976, Governor Wallace issued an order which prohibited officers of the Alabama National Guard from receiving such extra duty pay unless expressly authorized by him in writing (R. 601).

In March 1977, after the ROI had been received by Governor Wallace, Governor Wallace requested and obtained the resignation of General Rollo as the Adjutant General of the Alabama National Guard.

Governor Wallace appointed Defendant General Gray to succeed General Rollo on or about March 24, 1977 "with orders to clean up the mess." (Gen. Gray depo. p. 44). That day General Gray called Respondent Jones and Representative Cates and requested that they have lunch with him. General Gray has testified in his deposition that he contacted Defendant Jones as Chairman of the Senate Standing State Government Committee, and Representative Cates as Chairman of the House Standing Committee on Military Affairs. (Gray depo., pp. 34, 35). The

Senate State Government Committee has jurisdiction of all military matters in the State of Alabama other than the appointment of general officers.

General Gray testified in his deposition that he had decided to suspend Colonel Cole for 30 days pending his investigation based on information which he had obtained in news articles and the ROI, but that he sought the meeting with Representative Cates and Defendant Jones prior to such action to be sure that the reports as to the total number of days as to which Colonel Cole and the other officers had been paid had been accurately reported (R. 612). General Gray testified that the people charged with abusing the extra duty days were in charge of the "whole ball game" at the Military Department of the State of Alabama, and in order for him to conduct an effective investigation, "it was absolutely essential for me to suspend them and get them out of there." (R 614, 615). Representative Cates and Defendant Jones merely confirmed that the reports were true.

The information Defendant Jones and Representative Cates gave General Gray was accurate and has never been

challenged. Defendant Jones did not recommend or suggest that Colonel Cole be suspended or that General Gray take any punitive action against Colonel Cole. As General Gray testified in his deposition, he did not seek Defendant Jones' advice and Defendant Jones gave him none with respect to any action that he might take (R. 616).

General Gray further testified in his deposition that during the period of suspension of Colonel Cole he conducted his own investigation and on the basis of such investigation discharged Colonel Cole. Defendant Jones had nothing to do with this decision of General Gray to discharge Colonel Cole, and General Gray has testified that his action was not based on any information which he received from Defendant Jones (R. 617).

Colonel Cole admitted on his deposition that he had no evidence that General Gray and Defendant Jones conspired to do anything to him other than that they had this meeting, and "bang, bang, bang" he got dismissed (R 620).

Defendant Jones has never suggested that any disciplinary or punitive action be instituted against Colonel Cole by any persons, although as a legislator

who has been charged with the responsibility of investigating the use of federal monies received by State agencies, Defendant Jones stated in his affidavit that he feels strongly that the practice and procedure under which these high ranking officers, including Colonel Cole, received large sums for extra duty in recruitment and retention was wrong. As noted, Colonel Cole had received pay for 486 days in a single year. Defendant Jones thought the practice should be stopped. The Interim Committee thought it should be stopped. The Senate Budget Committe thought it should be stopped. The National Guard Bureau and the Governor of Alabama ordered it stopped (Cole depo. p. 500). Moreover , the practice was in plain violation of Army regulations during much or all of the time Colonel Cole and high ranking officers were engaging in the practice (See Cole's depo., pp. 247, 501).

Colonel Cole appealed his dismissal by General Gray to the Alabama Personnel Board. After a lengthy hearing, this Board ordered him reinstated. But the Board denied him 33 days of salary in addition to the 30-day loss of salary imposed by General Gray at the time

of his suspension. The Board was also critical of the practice which permitted Colonel Cole and other high ranking officers to serve as much time on extra duty as Colonel Cole. The Board's opinion stated:

> The policy, or lack of policy, which permitted an officer to serve as much time on active duty as Colonel Cole served within the past three years has now been changed and that was an appropriate corrective action to be taken. . .
>
> The new Adjutant General might well judge that Colonel Cole has abused the rules and regulations which permitted him to serve so much time on active duty and it seems to us within the Adjutant General's prerogative to assess a disciplinary suspension against Colonel Cole for that adjudged abuse. But abuse of the rule, as distinguished from violation of the rule, does not justify dismissal from employment.
>
> There is evidence that Colonel Cole has not strictly followed formal requirements for filing leave forms but such failure is not nearly sufficient to justify dismissal from employment. There is also evidence that Colonel Cole has made what some would consider to be questionable expenditures of funds for dinners with Guard personnel from other states and for gifts, such as baby gifts for Guard employees, but those expenditures appear to have been authorized by the National Guard policy then in effect. . .
>
> The Board understands and respects the heavy burden on the present Adjutant General to correct and prevent even suspected violations of laws or regulations that have been the object of an official

> investigation and report by the Office of the Army Inspector General. The very existence of the report calls for action on his part. He is to be commended for assuming this obligation and for acting without hesitation in what he undoubtedly feels is in the public interest. In the case of Colonel Cole, however, the Board believes that the remedy should be more corrective than disciplinary (R 577, 578).

Whether Colonel Cole should have received 60 days' loss of pay, dismissal, or no loss of pay is not the issue. Defendant Jones had nothing to do with any punitive action. As the trial court stated, the action taken against plaintiff Cole "was a part of an overall disciplinary action taken against fourteen of the high ranking Alabama Army National Guard officers for an Alabama Guard-wide policy of violating certain regulations." (R 685).

The only conversations Defendant Jones had with Representative Holmes relative to the Alabama National Guard were in the meetings of the Interim Legislative Committee (R. 578).

Defendant Jones never made any public statements in which Colonel Cole's name was even mentioned. But plaintiff Cole's claim of defamation by Senator Jones

is based solely on the following statements which Plaintiff Cole contends stigmatized and injured him:

(1) On or about April 26, 1976, Defendant Jones made a statement as Chairman of the Interim Committe to the effect that Governor Wallace had halted payments of extra duty days to National Guard officers pending an army investigation. The statement, made in the Committee room incident to the Committee hearing was "The Committee believes that money has been squandered out there in active duty days." (News article from the Anniston Star, dated April 27, 1976, R. 625). The news article shows that the Committee had earlier disclosed that General Rollo, the State Adjutant General, in the preceding year had received a State salary of about $23,000 and another $22,700 in federal compensation by claiming 171 days of active duty in addition to his fulltime State job. Neither the article nor Defendant Jones' statement mentioned Colonel Cole. Moreover, the statement is absolutely true in expressing the opinion of the Committee. The trial court and the Court of Appeals properly found this statement to be absolutely privileged under the doctrine of legislative immunity (R. 693).

(2) In December of 1977, Major Hathorn was having a hearing in connection with the withdrawal of his federal recognition as an Army officer. This was long after the Interim Committee had been dissolved and the ROI had been published. It was also long after the action by General Gray in terminating the employment of Colonel Cole, and months after Cole's reinstatement by the Personnel Board. The charges against Major Hathorn included operating a novelty company which sold products to the National Guard, as well as abusing his position by obtaining excessive amounts of overtime pay under the recruiting and retention program.

Incident to his trial, General Rollo and Major Hathorn's attorney made derogatory, public statements which were widely circulated in the news media in Defendant Jones home county. For example, General Rollo charged in his testimony in the Hathorn hearing that his own firing as Adjutant General was part of a "stinking political activity" resulting from Senator Jones' efforts to get promoted to a general in the National Guard. When the television media asked Defendant Jones for a comment

to this charge, he stated:

> ". . . they are using. . . this to cover up, a camouflage, when ya'll really ought to be out there covering the trial and not worrying about my promotion. You ought to be out there covering the testimony of what's been brought out against these people. And all this is to take the heat off of them. Fred Jones has done nothing wrong. The people out there that's on trial are the ones that's done something wrong in the military department... as long as I'm serving as a Senator of Alabama... I'm going to serve the people of my district and I'm going to do what's right, and I'm going to speak out if it costs me a generalship. . ."

(3) At the same time in the December 6, 1977 issue of the Montgomery Advertiser, the following was reported:

> It was Jones, in his role as Chairman of a legislative committee, who first questioned recruiting practices in the Guard. The Committee's investigations led to a full-scale probe by the Army.
>
> The Committe action came after Jones had been denied the promotion to general.
>
> One of those ousted was Rollo, and Jones referred to him on Monday. "Rollo's after me," he said. "They are trying to strike back at me."
>
> "These people who were punished are playing politics," he said. "These defendants have played politics to the hilt. They put so much political pressure on the Governor that he had to back down."
>
> Defendant Jones was responding to the personal attack levelled at him.

(4) Finally, when Defendant Jones was again contacted in December 1977 concerning the Hathorn hearing, in response to questions from a news reporter concerning the charge that the Hathorn hearing was a "stinking political" mess stirred up by Senator Jones because he had not received a promotion and the suggestion that Jones failed to appear to testify, Senator Jones stated:

> "They don't want me to testify. Those people have been caught with their hands in the cookie jar and now all they can do is holler politics."

In no way did the remarks of Senator Jones represent, as charged by Plaintiff Cole, a "continuing vendetta" against Cole. Once again, Cole's name was not mentioned by Defendant Jones, nor was his name mentioned in the news articles surrounding Senator Jones' response to the charges aimed at him. No public statements were made by Senator Jones concerning any aspect of the National Guard controversy for many months until General Rollo and other made the charges against him to which he responded (R 580, 581).

Colonel Cole and Senator Jones have sharply differing opinions as to the practice of fulltime, State military officers drawing eight hours of State

pay on the same day they draw eight hours of federal pay for performing the same duty assigned to them in their State jobs, i.e., recruiting and retention. The Governor of Alabama and the United States Army agreed with Senator Jones and ordered the practice stopped.

Colonel Cole admitted on his deposition that the extent of the use of recruiting and retention funds by Colonel Cole and other high ranking Alabama National Guard officers had been prohibited at least since April 1975 by the National Guard Bureau, although not discontinued by Colonel Cole and the Alabama National Guard until some months thereafter and after the investigation by the Interim Committee had commenced (Cole depo. pp. 499-501). To the extent that the Committee of which Senator Jones was Chairman contributed to this practice being stopped by bringing the practice to the public's attention, it was discharging its obligation as a legislative committee. In responding to the charges levelled at Senator Jones that his efforts and the efforts of the Interim Committee to halt this practice were a "stinking political activity" because Senator Jones

had been denied a generalship, Senator Jones was responding to a personal attack on himself and was informing his constituency concerning legislative action taken by him and the Interim Committe of which he was Chairman.

SUMMARY OF ARGUMENT

When broken down, Petitioner has three basic arguments. He first contends that he was defamed by Respondent Jones acting under color of state law and that, as a result, he suffered a loss of a property or liberty interest. Secondly, Petitioner contends that Respondents conspired to deprive him of his job without due process of law and that they thereby denied him equal protection. Finally, Petitioner contends that these actions were taken against him because of his exercise of First Amendment rights. Petitioner alleges that Respondents' reprisals against him arose from his expressed support of a strong Army National Guard.

None of Petitioner's contentions are well taken. Accordingly, each was properly rejected by the Court of Appeals. The Fifth Circuit's decision is fully consistent with the prior rulings of this Court. The petition for a writ of certiorari should, therefore, be denied.

With regard to Petitioner's defamation claim, the statements made by Senator Jones must be divided into two time periods. The first period coincides with

the life of the Alabama Legislature's interim committee to investigate the use of federal monies received by State agencies. The Committee dissolved on June 3, 1976. Prior to that time, Senator Jones stated in the Committee room that "the Committee believes that money has been squandered out there in active duty days." This statement unquestionably was protected by absolute legislative immunity. In addition, the statement was true. The only other statements allegedly made by Senator Jones prior to June 3, 1976, were in conversations with Major Cummings. There is no evidence that these statements were defamatory or even as to what the statements were. Moreover, Petitioner was afforded a due process hearing in connection with all charges against him, and that is all the law requires. Finally, if the statements made by Jones reported a violation of National Guard regulations, they were privileged and cannot, in any event, be admitted into evidence.

The second period relevant to Petitioner's defamation claim is post June 3, 1976. All remarks made

by Senator Jones after that time occurred in December of 1977. Because Petitioner had been reinstated to his position on July 28, 1977, however, any alleged defamation clearly could not have been attended with the loss of a property or liberty interest. Under Paul v. Davis 424 U.S. 693 (1976), therefore, Petitioner cannot recover under the Civil Rights Act. Moreover, the evidence is undisputed that Jones' remarks made in December of 1977 did not refer to Petitioner Cole. Finally, all statements made by Jones were true.

Petitioner's second contention is that Respondents conspired to deprive him of his job without due process of law. This contention is without merit for several reasons. First, as to Respondent Jones, the evidence failed to raise a fact issue with regard to his alleged conspiratorial participation. The Court of Appeals correctly so found, and that finding should not be reviewed on a petition for a writ of certiorari. Secondly, even if there had been a factual issue with regard to a conspiracy, the Court of Appeals' decision

still was appropriate. Several different entities investigated Petitioner's conduct and found that he had violated National Guard policy. A conspiracy to fire someone for a legitimate reason is not unlawful so long as due process rights are protected. That is, although there was no conspiracy in this case, a conspiracy in and of itself is not unlawful. Moreover, so long as there is a legitimate reason for attempting to terminate someone's employment, it does not matter what the motive is. Finally, with regard to Respondent Jones, Petitioner's cause of action based on a conspiracy is defeated by the doctrine of legislative immunity.

Petitioner's final contention is that Respondents took action against him because of his expressed support of a strong Army National Guard. Consequently, according to Petitioner, Respondents have violated his First Amendment rights. The Court of Appeals properly found that absolutely no evidence supported this allegation.

ARGUMENT

I The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's claim based on defamation.

All claims based on alleged defamatory statements made by Respondent Jones must be divided into two time periods. The first period coincides with the life of the Alabama Legislature's Interim Committe to investigate the use of federal monies received by State agencies. The Committee dissolved on June 3, 1976. Prior to that time, Senator Jones stated in the Committee room that "The Committee believes that money has been squandered out there in active duty days." The only other statements allegedly made by Senator Jones prior to June 3, 1976 were in conversations with Major Cummings.

Although there is no evidence that any statements made during this time period related to Petitioner Cole, they are in any event protected by the doctrine of absolute legislative immunity. This immunity is derived from the common law and survived the passage of the Civil Rights Act of 1871. Tenney v. Brandhove, 341 U.S. 367, 61 S.Ct. 783 (1951).

Legislative immunity encompasses any legitimate legislative activity. Moreover, Tenney makes clear that the activities of a fact finding committee fall within the scope of "legitimate legislative activity." Consequently, any actions taken by Respondent Jones prior to June 3, 1976 are protected.

Petitioner contends to the contrary that Jones' communications with Major Cummings prior to June 3, 1976 are not immunized. Even if Petitioner is correct, there is absolutely no evidence that Jones said anything of a defamatory nature to Cummings. Moreover, under the doctrine enumerated by this Court in Vogel v. Gruaz, 110 U.S. 311, 4 S.Ct. 12 (1884), any such communications would be privileged. That is, if Jones were reporting the violation of some laws, or of National Guard policy, the government official to whom the information was given could not testify in any subsequent action brought by Cole against the informer. The policy underlying this Court's holding was to encourage citizens to report law violators to the appropriate authority. Consequently, not only is there no evidence before this Court of any defamatory communication, but

also there culd be no such evidence at trial. Accordingly, Respondent Jones was entitled to have a summary judgment in his favor.

Finally, with regard to the pre-June 3, 1976 period, Petitioner was afforded a due process hearing on all charges against him. That is all that the law and the constitution require. See Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976); Board of Regents vs. Roth, 408 U.S. 674, 92 S.Ct. 2701 (1972).

The Fifth Circuit's decision also was correct with regard to the period of time following the expiration of the legislative committee, even assuming that there is no legislative immunity. In Paul v. Davis, supra, a person was erroneously identified as a shoplifter on a flyer circulated by a local chief of police. The Court acknowledged that the facts would support a state court claim for defamation, but held that neither the Fourteenth Amendment nor 42 USC §1983 made actionable a defamation by a state official.

The Supreme Court in Paul v. Davis stated:

> ". . . Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts had been

> invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the state may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be administered by the States. We have noted the 'constitutional shoal' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckenridge, 403 U.S. 88, 101-102, 91 S.Ct. 1790, 1797-98, 29 L.Ed. 2d 338, 347-48 (1971); a fortiori the procedural guarantees of the Due Process Clause cannot be the source for such law." 96 S.Ct. p. 1160.

Petitioner contends that his injury was more than defamation because he was removed from his job. But the cases relied on by Petitioner involving defamation coupled with job removal were actionable under §1983 or the Fourteenth Amendment only when plaintiffs were denied a hearing and thus were denied procedural due process. See e.g., Board of Regents v. Roth, supra, holding that if a teacher is defamed in connection with his discharge, where he has tenure, he is entitled to a hearing. Petitioner Cole not only was granted a full hearing before the State Personnel Board, but also that Board ordered him reinstated with some back pay, despite that it found that Cole's conduct was inappropriate.

It should be noted in this regard that the action of General Gray in suspending and then terminating the employment of Colonel Cole was not in any way caused by any action by Respondent Jones, except that prior to Colonel Cole's suspension, General Gray sought and obtained from Respondent Jones confirmation that the extra duty days reported in the ROI for Colonel Cole were correct. But even if General Gray had been urged to terminate Colonel Cole by Respondent Jones and had acted on such urging so that the act of General Gray became in some way the act of Respondent Jones, the suspension and discharge with a review by the State Personnel Board not only did not deny plaintiff any procedural due process, but also they were not violative of any Fourteenth Amendment substantive due process right. The reviewing authority, the State Personnel Board, after a lengthy hearing conceded that the acts of Colonel Cole were wrongful and not only allowed the initial suspension of General Gray to stand, but also added a further suspension of thirty days.

There are several other reasons that the Fifth Circuit's decision was correct. First, at the time

the post June 3, 1976, statements were made, Cole already had been reinstated to his job. That is, no property interest deprivation attended the alleged defamation.

Secondly, these statements were in response to widely publicized remarks in press and television in Senator Jones' home county charging that the hearing involving not Cole, but rather Major Hathorn, was a "stinking political" mess stirred up by Senator Jones because of his disappointment in not getting a promotion in the National Guard. Because Senator Jones' remarks did not in any way identify or relate to Cole, who already had been reinstated, the remarks could not be actionable. Petitioner Cole was not a party in the Hathorn hearing. He had levelled no accusation at Jones, and Jones' remarks referred to the people on trial who were accusing him of wrongdoing.

Thirdly, the trial court properly found that Petitioner Cole was "a public person by virtue of his high position in the Alabama National Guard as well as by the great public interest created therein by evidence of alleged inproprieties practied therein." (R 693).

The remarks were, therefore, not protected by the First Amendment and were not actionable.

In order to uphold the "profound national commitment...that debate on public issues be uninhibited, robust and wide open," the Court in New York Times v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710 (1964), held that the First Amendment barred suit by a public official based on his conduct as a public official unless there was a showing that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.

In the instant case, not only did Senator Jones and his committee have information that caused them to believe that certain high ranking officers, including Colonel Cole, had violated Army regulations and were abusing their high positions to get excessive federal benefits, this was the conclusion of the Governor of Alabama who ordered the practice halted. It was the conclusion of the ROI which was authorized by Major Holmes and Major Cummings and approved by the Commanding General of the First Army. It was the conclusion of the Senate Budget Committee whose report is quoted in

part in the Statement of the Case. It was the conclusion of the State of Alabama Personnel Board. It was the conclusion of Lt. Colonel Lundy and Lt. General Fuller as the result of Lt. Colonel Lundy's separate investigation. It was the opinion of General Gray who was appointed Adjutant General by Governor Wallace. (See his statements in his deposition, pp. 66, 179).

Moreover, the fact that this practice was in violation of Army regulations was admitted by Colonel Cole (Cole depo. p. 501). Thus Senator Jones' statements insofar as they can be said to relate at all to Colonel Cole were accurate when they say: "The people out there that's on trial are the ones that's done something wrong...." If this related to Colonel Cole, as Petitioner insists, it had to relate to the practice widely publicized in the news media and described as "double dipping" and the other offense charged to Colonel Cole in the ROI of "back dating orders." Since "double dipping" and "back dating orders" were prohibited by Army regulations, and since Colonel Cole admitted participation in both practices to his substantial financial benefit, it is inconceivable that describing the activity as "wrong"

or charging that "they are the ones that have been caught with their hands in the cookie jar" is actionable. Colonel Cole admitted that the practice of getting eight hours of pay from the State and then eight hours of federal pay within the same twenty-four hour day was prohibited, but as Personnel Officer he continued to allow himself and others to do it until after the Interim Committee began its investigation (Cole depo. p. 501, R. 624).

As the Supreme Court stated in Greenbelt Cooperative Pub. Co. v. Bresler, 398 U.S. 6, 13, 90 S.Ct. 1537 (1970), the charge that the plaintiff committed "blackmail"--clearly a criminal offense--was not actionable because the factual basis for the remark was evident in the context of the public discussion, and, therefore, was not actionable when published or spoken. Defendant Jones' remarks were clearly referring to the acts of Hathorn and General Rollo which were characterized as wrongful in the ROI, and if the remark can be read as including Cole, it could have no other reference than his actions in violation of Army regulations, which, when brought to the attention of the Governor, the public, and the Army, were promptly stopped.

In Gertz v. Welch, Inc. 418 U.S. 323, 94 S.Ct. 2997 (1974), the Court pointed out that those "properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard of the truth." (Emphasis added.) In the instant case, not only is there no clear and convincing evidence in the thousands of pages of depositions that Respondent Jones made any comment with knowledge of its falsity; but also there is not any evidence that any statement by Defendant Jones was false.

Apparently Colonel Cole does not believe that he or the other officers who were paid for over 400 days in a single year did anything "wrong"--even though he concedes the practice violated applicable Army regulations (Cole depo. p. 501 R. 624.) Nevertheless, the unanimous agreement of all who investigated or otherwise became aware of the practice of "double dipping" that it was wrong is evidence that the plaintiffs' view of the wisdom nad propriety of continuing the practice lost out in the arena of free discussion. It would make

a mockery of the First Amendment to say that the Petitioner, having been adjudged wrong by the bar of public opinion and by every individual and agency who has reviewed his activity, can nevertheless harass a legislator who criticized his conduct and put that legislator to the tremendous expense of defending himself in this suit.

II The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's conspiracy claim.

Petitioner contends that Respondent Jones conspired with the three other Respondents to deprive Colonel Cole of his civil rights in violation of §§ 1983 and 1985 of 42 USC. [1/] But, as properly held by the Fifth Circuit, the evidence of such a conspiracy is totally lacking, as is the evidence of any deprivation of Colonel Cole's civil rights.

Petitioner contends that Respondent Jones conspired with Major Cummings to get Major Cummings to write a critical report of Colonel Cole. What is the evidence from thousands of pages of depositions and affidavits?

On March 9, 1976, after the Interim Committee had held public meetings at which reports of wrong-

1/ The claim under Section 1985 is totally misdirected. Under Section 1985, there must be a finding of some kind of invidiously discriminatory motivation, such as racial or religious bias. See Save Our Cemeteries v. Archdiocese of New Orleans, 568 F.2d 1074, (CA 5), and Griffin v. Breckinridge, 403 U.S. 88, 91 S.Ct. 1790.

doing in the Military Department had been widely publicized in the press and television, General Rollo, the Adjutant General of the State of Alabama, requested that the Commanding General of First Army conduct an investigation of the Alabama Army National Guard. Major Cummings and Major Holmes were sent from Washington D.C. by First Army to conduct the investigation. Neither man had had any previous contact with any of the Alabama respondents. Shortly after the arrival of Majors Cummings and Holmes, they were contacted by Senator Jones as Chariman of the Interim Committee. The contact was a telephone call from the Committee room with the Committee in session and at the instance of the Committee. The call merely invited these officers to meet with the Committee. Major Cummings first sought and obtained clearance from First Army for such a meeting, and then he and Major Holmes met briefly with the Committee. This single meeting was the only personal contact that Respondents Jones or Holmes or the Committee ever had with Major Cummings. (General Gray never had any contact with these officers until many months after the ROI was published.)

At this meeting, Senator Jones on behalf of the Committee offered to make available to Majors Cummings and Holmes any information which the Committee had obtained with respect to the National Guard. He advised them generally as to the nature of this information. It is the judgment and recollection of Respondents Jones and Holmes that Petitioner Cole's name was never mentioned. There is no evidence to the contrary.

Majors Cummings and Holmes never sought to obtain the information which the Committee offered to share with the investigating officers. Respondent Jones as Chairman of the Committee at the instance of the Committee and from the Committee room with the Committee in session did on four or five subsequent occasions telephone Major Cummings to advise him of reports concerning irregularities in the National Guard which had reached the Interim Committee. Colonel Cole's name was never mentioned in these conversations, and the matters discussed did not even concern matters in which Colonel Cole was involved (R 573). Such

telephone conversations included reports of such wrongs as improper use of helicopters, nepotism and misuse of National Guard funds in expenditures. Colonel Cole was not involved in these matters at all.

Colonel Cole in his deposition conceded that he had no knowledge of any communication between Respondent Jones and either Majors Cummings or Holmes other than the meeting when the Committee was in session, and the few telephone calls from Senator Jones to Major Cummings at the instance of the Committe and while the Committee was in session (R 584).

Even if in some inexplicable way these meetings and telephone calls could constitute a basis for a conspiracy charge, they would not be actionable, being protected by legislative immunity. As stated in Slavin v. Curry, (CA 5) 574 F.2d 1256, 1264, a judge is absolutely immune from a suit for damages even for participating in a conspiracy if he did not participate in the conspiracy other than in his judicial role. Clearly the only contact between the Alabama legislators and Cummings was in the formers' capacities as legislators performing legislative functions.

The ROI was many hundreds of pages in length with additional hundreds of pages of exhibits. Majors Cummings and Holmes interviewed dozens of witnesses, including Colonel Cole. Its information far exceeds any information obtained by the Interim Committee. The ROI was sharply critical of many areas within the Alabama National Guard. Most of the areas of criticism did not relate to Colonel Cole at all. Some did. Colonel Cole as Personnel Officer was criticized in the ROI for violating Army regulations by issuing orders after the duty had allegedly been performed or "back dating orders." Colonel Cole concedes that he so violated applicable Army regulations (Cole depo. p. 247). None of the Alabama respondents had any knowledge of this violation by Colonel Cole until reading it in the ROI. The ROI also criticized the Personnel Officer for allowing high ranking officers to work eight hours for the State and then claim an additional eight hours of federal pay on that same day for allegedly working an additional eight hours. This was also in plain violation of applicable Army orders and directives (Cole depo., p. 501 R. 625).

It is incredible that anyone who has read the ROI and seen the hundreds of pages of exhibits thereto would suggest that it was the product of any action by respondent Jones. Respondent Jones thought the excessive number of days which were in violation of existing Army orders was improper and should be stopped. Respondent Holmes also thought they were improper and should be stopped. The ROI correctly stated that they were in violation of the letter and the spirit of Army regulations and should be stopped. This is the one common thread for alleging a conspiracy between Jones and Cummings. But as already pointed out, substantially every group and every individual who has examined the practice has been sharply critical of this parctice, and where such groups or individuals have had an opportunity to take action, they have ordered it stopped. The Senate Budget Committee, The Alabama Personnel Board, Governor Wallace, the Department of Examiners and Accounts, Lt. Colonel Lundy, Lt. General Fuller, and many editorials in various Alabama newspapers have all called for the end of the practice and criticized those who like

Colonel Cole have engaged in the practice. See, for example, the news articles and editorials in the Record at pages 588,589, 604, 605,607, 609-611.

These individuals, groups and newspapers are not part of a conspiracy. They sincerely believe as Senator Jones believes that the practice which was actually in violation of clear regulations of the Army was wrong.

One news article in the Record quotes at length from a staff report of the Budget Control Subcommittee charging that "a select few high ranking Alabama National Guard officers have put personal gain above the best interest of the Guard." (R.607) Senator Jones was not on the Budget Control Subcommittee. No statement by Senator Jones is any stronger with respect to this practice than the report of the Budget Control Subcommittee. Is this Committee also a conspirator, along with Governor Wallace, the Personnel Board, other Army review agencies, and the newspapers of the State?

In the Montgomery Advertiser of May 12, 1976, for example, an editorial is vehement in its criticism of

this practice (R. 605). In part the editorial states:

> "And right here in Alabama, top National Guard officials have been caught being a little too generous with themselves on pay day.
>
> The situation has become so serious that the State Adjutant General may be asked to turn in his stars. (He was and resigned.)
>
> The question of honesty remains in the shadows, but a number of top Guard officers have managed to do quite well financially of late. . .
>
> Well, it may be that. . .Rollo and his select group of double-dippers will be called to task for their misdeeds.
>
> Perhaps, in their own minds, the Guard officers who reaped such substantial financial rewards for their efforts, honestly believe they did no wrong.
>
> It may even be that they can justify their actions, by the small print in some regulation.
>
> But the entire matter still has the aroma of fish left too long in the sun.
>
> The Governor was correct in putting a belated halt to Rollo's overtime program, and the interim legislative panel looking into the matter is justified in calling them to task for their transgressions.

Another editorial in the Montgomery Advertiser on March 24, 1977 refers to the "double dipping" and states

> "The practice is clearly illegal, and in fact, in the course of the legislative inquiry, Governor Wallace directed that double dipping be stopped at once."

This editorial was written without having seen the ROI and called for its release to the public (R. 610).

The facts in the ROI were not supplied by Senator Jones or even by the Interim Committee. But the accuracy of the basic facts in the ROI have not been challenged. Colonel Cole's criticism of the ROI has been that its language was too "flowery" (Cole depo., p. 204), and that he didn't like the "manner" of Major Cummings. (Cole depo., p. 205) Stated another way, Colonel Cole objected to the characterization of the facts in the ROI, but he could not deny that Army regulations were violated in the program that resulted in the payment for 486 days in a single year to Colonel Cole.

The evidence of any conspiracy embracing Jones and General Gray is equally lacking. General Gray was appointed by Governor Wallace to succeed General Rollo after Governor Wallace had procured General Rollo's resignation. General Gray promptly after notice of his appointment, contacted Senator Jones as Chairman of the Senate Committee with oversight of the Alabama Military Department and Representative Cates as

Chairman of a similar committee in the Alabama House of Representatives. He wanted to establish a relationship with these Chairmen and asked them to have lunch with him. He testified that he had already determined to suspend Colonel Cole and several other high ranking officers for thirty days, but before taking the action he sought verification from these legislators as to whether the news reports and information in the ROI concerning the extra duty days for these officers was correct (R. 612). Senator Jones and Representative Cates correctly confirmed the accuracy of the information. This was the sum of the conversation between Jones and Cates and General Gray. Cole testified that he had no evidence that Jones and Gray conspired to do something to injure him other than that they "had a conference and bang, bang, bang," he got dismissed (R. 620).

General Gray testified that he had determined that it was necessary to suspend the high ranking officers involved in the large amount of extra duty pay prior to meeting with Senator Jones and Representative Cates because they controlled the Alabama Military Department, and he could not conduct an effective investigation with

them on the scene. (R. 614,615)

The ultimate termination of Cole by General Gray followed General Gray's own investigation. His decision was based "entirely on the ROI and his own independent investigation and judgment." (R. 617) He never consulted with Senator Jones with respect to this decision and received no advice from him (R. 616). In his deposition, General Gray forcefully expressed his opinion that "it is totally intolerable in the military for a high ranking military officer to use his position for personal gain." (Gray depo., p. 66) His investigation disclosed that plaintiff Cole had so used his position. He testified unequivocally that in his opinion what these high ranking officers had done "was very wrong". (Gray depo., p. 179)

Finally, there is no evidence that Jones and Holmes were part of a conspiracy to injure Cole. The only times they ever saw each other where National Guard matters were discussed were at meetings of the Interim Committee, and on the one occasion long after Cole had been reinstated when they met and gave public statements

in response to the charges by General Rollo and Major Hathorn's attorney that the criticisms by Senator Jones and the Interim Committee were all a "stinking political" gimmick stirred up by a frustrated Senator Jones.

In his deposition taken months after suit was filed, Colonel Cole stated that the only evidence of a conspirac between Jones and Holmes was the news articles in which Jones and Holmes were critical of the excessive use of extra duty days. As Cole stated: "There was a continuous outpouring of information from the Committee from the beginning."

"Q. Do you have any other evidence?

A. No, not now.

Q. You have nothing further, no further evidence to support it?

A. No." (Cole depo., pp. 568, 569)

As the District Court stated in its opinion, "proof of knowledge of a conspiracy must be clear and unequivocal." (R. 686) Not only is there no "clear and unequivocal proof of a conspiracy," but also after thousands of pages of depositions, there is no evidence at all of a conspiracy. In a free society can any man

who speaks out against official acts by public officials really be sued for $8,000,000 on a conspiracy theory where the sole evidence rests on the sequence of events that he served on a legislative committee which was critical of extra duty days, that an investigation of this practice by officers from First Army and other investigating agencies with which he had absolutely no contact were also sharply critical, that the Adjutant General appointed to succeed General Rollo thought the practice was a violation of the officer's responsibility and fired him based on his own investigation and the report of the Army investigation? Governor Wallace reviewed the ROI, acted on it and called for the resignation of General Rollo. Even if Senator Jones had advised Cummings of the facts in the report, which he did not do because Cummings conducted his own exhaustive investigation, this would not be evidence of a conspiracy.

The same is true of course of General Gray where Colonel Cole says the evidence of the conspiracy is the meeting between General Gray and Senator Jones and Representative Cates and then "bang, bang, bang," he

was fired. Surely persons in this country cannot maintain a suit on such evidence. To allow such suits will not have merely a "chilling" effect on efforts of legislative oversight committees to criticize the performance of public officials, it will have a terminal effect. The Supreme Court pointed out in Ingram v. United States,360 U.S. 672, 79 S.Ct. 1314, that "charge of conspiracy are not to be made out by piling inference upon inference." Although Ingram was a criminal case the danger in allowing proof of conspiracy to rest merely on flimsy inference applies equally to a civil suit.

Jones was not entitled to summary judgment on the conspiracy claim for another reason. That is, Petitioner was not deprived of any rights, privileges, or immunities under the Constitution. If two people report on an event and each concludes that the action of a third person was improper, their conclusions and their statements of thier opinion that the third party's action was wrongful, does no and should not give rise to a §1983 action for a conspiracy depriving anyone of his Constitutional rights.

In a hypothetical situation, a Senator is Chairman of an Interim Committee to investigate the use of federal

monies by a state agency. He is also chairman of the standing committee directly responsible for oversight of this agency. He is critical of some of the practices of the higher paid officials in the agency and calls for an investigation of the agency. He offers to provide the investigating officers with all of the reported irregularities on the part of these officials, which have come to the attention of the committee. The investigating officers receive these reports and make their own investigation which also is sharply critical of some of these reported irregularities and of other irregularities developed by the independent investigation of these officers. The Governor obtains the resignation of the head of the agnecy because of these "irregularities." On the basis of his own investigation and the report of the investigating officers, the person who replaced the agency head first suspends and then discharges the Petitioner because of Petitioner's failure to follow applicable regulations. The Petitioner appeals his termination under state law to the agency charged with the responsibility to hear appeals. This agency is critical of the acts of the Petitioner but

deems the punishment of termination too severe and orders reinstatement but adds an additional thirty days to the original suspension. Even on these facts, could the Senator be subject to a Section 1983 suit? Of course not. The Petitioner has not been denied a Constitutional right, and these facts do not permit a jury to conclude that a conspiracy exists to deny him his Constitutional rights.

Of course the facts with Senator Jones differ from the hypothetical in that General Rollo and not Senator Jones called for the investigation by First Army. Senator Jones had no such authority. It also differs in that the investigating officers did not accept Senator Jones' offer to turn over to them reported irregularities. But in neither event could the Senator consistent with the law and the Constitution properly be subject to this suit.

As previously stated, in order to maintain a conspiracy action under Sec. 1983 there must have been an "actual denial of due process or equal protection" by persons acting under color of state law. Hanna v. Home Ins. Co., 281 F. 2d 298 (CA.5). In the recent case of Slavin v. Curry, 574 F. 2d 1256 (CA 5), the Fifth Circuit

Court reaffirmed its holding in Hanna that actual denial of due process or equal protection is a requisite to maintaining a conspiracy action under Section 1983.

As the Court of Appeals of the Second Circuit stated in Canty v. Board of Education, 448 F. 2d 428 (CA 2):

> "The civil rights statutes confer jurisdiction only when 'the right or immunity is one of personal liberty not dependent for its existence upon the infringement of property rights.'"

The Canty court quoted Tichon v. Harder, 438 F. 2d 1936, 1402 (CA 2):

> "Congress did not intend that every claim of unfair treatment be a state of an employee, even accompanied by a lack of procedural due process, could be brought to the federal courts."

In the instant case, Petitioner Cole has been accorded procedural due process, and the due process hearing before the Personnel Board ordered his reinstatement. He was in no way denied equal protection of the law. In Pool v. Williams, 280 Ala. 337 194 So. 2d 87,88, the Alabama Supreme Court pointed out that all employees of the State accept the provisions of law governing their employment. "To suspend an employee in conformity with the provisions of law governing his employment does not deprive the employee of right or property without due process of law."

Finally with regard to the conspiracy claim, it must be re-emphasized that a conspiracy in and of itself is not unlawful. If a group of people make a joint effort, which was not present in this case, to fire someone for a legitimate reason, they have not violated the Civil Rights Acts. Because Cole was in fact guilty of some wrongdoing and because that wrongdoing was the basis of his discharge, he can state no cause of action based on a conspiracy.

III The Fifth Circuit Court of Appeals properly ruled that summary judgment for Respondent Jones was appropriate on Petitioner's First Amendment claim.

Petitioner finally attempts in his petition for a writ of certiorari to assert a claim based on the First Amendment. In that claim, Petitioner maintains that he was discharged because of his advocacy of a strong military defense. It suffices to say that there is not a shred of evidence in the record to support that claim. On the lack of evidence alone, summary judgment is appropriate.

This Court's decision in Mt. Healthy City School District Board of Education vs. Doyle, 429 U.S . 274, 97 S.Ct. 568 (1977), however, also is relevant. In that case, the Court held that even if a plaintiff can prove that one of the reasons for his discharge was unconstitutional, he still is entitled to no relief if there was another, legitimate reason for his discharge. All of the evidence before this Court shows that Petitioner Cole was discharged because of his wrongdoing. Even if one of the defendants below objected to a strong military defense, and

there is absolutely no evidence that any of them did, that was not the reason for Cole's discharge. At the very least, even considering the evidence in the best light for Petitioner, Colonel Cole must acknowledge that one reason for his discharge undisputedly was his "double dipping." Whether that activity was unlawful is not important. There is no question but that Cole's conduct constituted a legitimate basis for his discharge.

CONCLUSION

In conclusion, there are no significant issues in this case that warrant this Court's review. Petitioner's attempt to build this case into a forum to argue the propriety of an all-volunteer Army simply makes no sense under the facts presented. There is no evidence that any respondent has a view different from Petitioner's. There is no evidence that that issue had anything to do with Petitioner's discharge.

In summary, this case has been considered by the District Court and the Fifth Circuit Court of Appeals. The issues have been fully explored. The decision of the Fifth Circuit was fully in accord with the decisions of this Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

Robert D. Segall

ROBERT D. SEGALL

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Response of Fred R. Jones to Petition for Writ of Certiorari upon Honorable Wade McCree, Solicitor General of the United States; Honorable William B. Moore, Jr Honorable Alvin T. Prestwood; Honorable Claude P. Rosser, J Honorable Sarah Greenhaw, Honorable Sterling Culpepper; and the Deputy Assistant Judge Advocate of the Department of the Army; Attorneys for Respondents-Defendants, by placi said copies in the United States mail, postage prepaid, and properly addressed to their respective business addresses as follows:

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This the 26th day of August, 1981.

Robert D. Segall
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